No. 96-43

In The

Supreme Court of the United States

October Term, 1996

WALKER L. CHANDLER, SHARON T. HARRIS, JAMES D. WALKER,

Petitioners,

v.

HONORABLE ZELL D. MILLER, LEWIS MASSEY, JAMES G. LEDBETTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1.

Is Georgia's Candidate Drug Testing Statute a legitimate exercise of state sovereignty under the Tenth Amendment and is its drug testing requirement a reasonable Fourth Amendment search?

2.

Does the Candidate Drug Testing Statute impose any restrictions upon Petitioners' First Amendment rights and, assuming it does, is it a content-neutral speech regulation which imposes only minimal burdens on speech rights and is justified by important state interests?

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STATEMENT OF THE CASE

A. Procedural History

Respondents (hereinafter "Georgia") accept the "Factual Background" of this case as set forth in Petitioners' brief at 3 with the exception of the final paragraph which constitutes argument concerning the merits of the Eleventh Circuit's opinion.

B. O.C.G.A. § 21-2-140

In 1990, the Georgia General Assembly enacted O.C.G.A. § 21-2-140 which requires candidates for many state public offices to take a urine drug test each time they seek to qualify to run for such office. (Copy of O.C.G.A. § 21-2-140 included in Georgia's Appendix to this Brief at A-1.) The "state offices" to which the drug testing requirement applies are set forth in subsection (a)(4) of the Act and include all elected constitutional officers.

The procedures which must be followed for compliance with the drug testing requirement of O.C.G.A. § 21-2-140 are set forth in the statute or were agreed upon in the Joint Statement of Undisputed Facts. (Joint Statement of Undisputed Facts included in Appendix at A-4.) The statute gives notice to potential candidates that eligibility for candidacy for any of the specified offices is conditioned upon submission of negative drug test results. The collection and testing of the specimen samples are administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed.

Reg. 11979 *et seq.*) or other professionally valid procedures. O.C.G.A. § 21-2-140(a)(2).

The statute allows the required testing to be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. (Joint Statement of Undisputed Facts) A3-5. The individual may provide the specimen in a stall or a partitioned area. 53 Fed. Reg. 11979, Subpart B, § 2.2(f)(7). If an agency-designated collection site is not available, then the collection site person remains in the restroom but outside the stall until the specimen is collected. *Id.* § 2.2(f)(9).

Only approved laboratories are used for analysis of the specimen and all chain of custody procedures are followed. A five panel drug screen is performed and there is no analysis to determine the presence of any other drugs, legal or illegal, or to identify physical or medical conditions such as pregnancy or epilepsy. *Id.* If an individual tests positive because he or she is taking a prescribed medication which is identified by the testing laboratory, the candidate may attach to his test report documentation from his physician that the medication has been prescribed.

The statute provides that the candidate shall submit certification that he or she has been tested for illegal drugs within 30 days prior to qualifying for nomination or election to state office and that the result of such test was negative (or if positive because of prescribed medication, medical documentation must also be submitted).

O.C.G.A. § 21-2-140(c). The laboratory forwards the testing results directly and only to the candidate. The information revealed by a positive result is not made available by the laboratory to any law enforcement agency or any agency responsible for criminal prosecution.

SUMMARY OF ARGUMENT

The Georgia candidate drug testing statute, O.C.G.A. § 21-2-140, was enacted pursuant to the power accorded the States under the Tenth Amendment. (Copy of Tenth Amendment included in Appendix at A-7.) This election qualifications statute is valid under the Tenth and Fourth Amendments because it imposes only reasonable and nondiscriminatory burdens upon Petitioners' right to be free from unreasonable search, there is a special need for such drug testing requirement, and such burdens as may be imposed by the drug testing requirement are substantially outweighed by important interests which justify the state's objective of identifying potential candidates who use illegal drugs. (Copy of Fourth Amendment included in Appendix at A-8.)

These important interests include giving assurance to Georgia voters that the candidates who seek to run for public office will have the integrity, trustworthiness, and judgment necessary to fulfill the significant responsibilities of state public office; avoiding the damage to public trust and confidence in government and damage to governmental operations which would result from an abuse of power by an elected official who has a problem

with illegal drugs; and deterring some individuals who use illegal drugs from entering the political arena.

The Court of Appeals for the Eleventh Circuit properly analyzed Respondent's candidate drug testing statute under the tests set forth in this Court's cases arising under the Tenth Amendment, *Burdick v. Takushi*, 504 U.S. 428 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); and those which have considered the validity of other government-imposed drug testing programs under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Vernonia School Dist. v. Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995). The majority's decision that the statute is a valid exercise of the power accorded to the States under the Tenth Amendment and that it does not violate Petitioners' rights under the Fourth Amendment should be affirmed.

With respect to Petitioners' argument under the First Amendment, the candidate drug testing statute does not in any way affect the free speech rights of potential candidates. (Copy of First Amendment included in Appendix at A-9.) Assuming any such impact, the statute is a content-neutral regulation and is justified by important state interests. The statute is therefore valid under the First Amendment and this Court should affirm the decision of the Eleventh Circuit on this issue.

ARGUMENT

I. GEORGIA'S CANDIDATE DRUG TESTING STATUTE IS A LEGITIMATE EXERCISE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT AND ITS DRUG TESTING REQUIREMENT IS A REASONABLE FOURTH AMENDMENT SEARCH.

A. Introduction

Georgia's drug testing statute is a valid exercise of the Georgia General Assembly's power under the Tenth Amendment to determine the qualifications of candidates to state elected offices. Under the Tenth Amendment, an election statute is constitutional if the level of restriction imposed upon fundamental rights is outweighed by the state's asserted justifications for the statute. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Further, the level of inquiry used in the analysis of the constitutionality of an election statute is lower than the level of scrutiny used by this Court in cases attacking the constitutionality of other types of statutes because of the deference given to the states under the Tenth Amendment to regulate their own elections. *Id.* This analysis, and lowered level of scrutiny, apply to the candidate drug testing statute involved in this case.

This Court has addressed the constitutionality of government drug testing programs in three previous cases. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Vernonia School Dist. v. Acton*, 515 U.S. ___, 115

S.Ct. 2336 (1995). These decisions are appropriate precedent for the constitutional analysis of drug testing requirements imposed by governmental entities in their capacities as employer or educator of public school children. They do not, however, address the constitutionality of a drug testing program enacted pursuant to the State's power to regulate its state elections under the Tenth Amendment.

B. Because the Georgia drug testing statute imposes only reasonable, nondiscriminatory restrictions upon Petitioners' fundamental rights, it is valid under the Tenth Amendment and requires Petitioners' Fourth Amendment challenge to be analyzed under a lowered level of scrutiny.

1. The Tenth Amendment entitles Georgia to determine for itself the qualifications of its elected officials and such qualification requirements are entitled to great deference by this Court.

This Court has long recognized that under the Tenth Amendment the states retain the power to regulate their own elections. *Burdick*, 504 U.S. 428 (1992); *Gregory*, 501 U.S. 452 (1991); *see also Sugarman v. Dougall*, 413 U.S. 634 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). *Gregory* has particular significance to the issues before this Court because the state regulation in that case, as here, set qualifications for state officials. In *Gregory*, this Court upheld a Missouri constitutional provision, which set a mandatory retirement age of 70 for all state judges, against challenges brought pursuant to a

federal statute and under the Equal Protection Clause of the Fourteenth Amendment. The Court accepted the state's rational basis justification for the age-based statute.

Gregory held that this Court's scrutiny in a case raising constitutional challenges against an election statute will not be so demanding because in such cases the Court is dealing with matters which rest "firmly within a State's Constitutional prerogatives." *Gregory*, 501 U.S. at 461-63. The Court stated also that it would lower its standard of review when evaluating the validity of exclusions included in such statutes. *Id.* at 463.

In *Gregory*, the Court emphasized the significance of provisions through which a state establishes qualifications for those who seek to hold public office:

> We [have] recognized explicitly the States' constitutional power to establish the qualifications for those who would govern. . . . Such power inheres in the State by virtue of its obligation, already noted above, to preserve the basic conception of a political community. And this power and responsibility of the State applies . . . to persons holding state elective and important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.

501 U.S. at 462 (internal quotations and citations omitted). *See also Taylor v. Beckham*, 178 U.S. 548 (1900); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892); *Luther v.*

Borden, 48 U.S. (7 How.) 1 (1849); *Pope v. Williams*, 193 U.S. 621, 632-33 (1904).

In *Taylor v. Beckham*, *supra*, relied upon in *Gregory*, 501 U.S. at 460, this Court held that the power of the states to prescribe the qualifications of their own officers *"should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."* *Taylor*, 178 U.S. at 570-71 (emphasis supplied). Given the state's sovereign power to establish its qualifications for those who exercise government power within the state, the relevant inquiry becomes, then, whether Georgia's candidate drug testing statute is prohibited by that which is "plainly provided by the Constitution of the United States." *Gregory*, 501 U.S. at 462, *quoting Taylor*, 178 U.S. at 571. *Gregory*, followed by this Court's decision a year later in *Burdick*, makes clear that the analysis of this issue should be pursuant to a "lowered standard of review."

2. The Georgia statute imposes only reasonable, nondiscriminatory restrictions of Petitioners' Fourth Amendment rights.

In *Burdick*, this Court held that *"when a state election provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."* 504 U.S. at 434, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (emphasis supplied). The Georgia statute meets this standard as applied to candidates and, accordingly, must be supported by important regulatory interests.

All potential candidates for the state offices which are included in O.C.G.A. § 21-2-140, as well as all political parties, *see* O.C.G.A. § 21-2-2(21), and political bodies, *see* O.C.G.A. § 21-2-2(19), know well in advance that before all candidates are eligible to run for state office, they must comply with the testing requirement within thirty days of qualification. This Court has previously noted that advance notice of the testing requirement diminishes the intrusiveness of the testing requirement. *See Von Raab*, 489 U.S. at 671-72 n. 2.

A second factor relevant to the inquiry is the extent of any invasion into the personal privacy of the individual in the giving of the specimen. The procedures of the Georgia testing program provide almost complete privacy during the collection process. The statute incorporates the federal regulations, which decreases the intrusiveness of a drug testing scheme. *Von Raab*, 489 U.S. at 660-61 n. 1. There is no testing for the presence of any other drugs or medications or to identify any physical or medical conditions. Again, these characteristics of the program significantly decrease the burden on the candidate's privacy interests. *Id.* at 671-72 n. 2.

In order to allow the candidate to make the decision whether to submit the test results in order to qualify to run for state office, such results are sent *directly and only to the candidate*. The testing schemes at issue in *Skinner*, *Von Raab*, and *Vernonia* were approved by this Court where the test results were sent either to the government employer or to various school officials. *See Skinner*, 489 U.S. at 610; *Von Raab*, 489 U.S. at 663; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2389. Certainly, the retention by the

potential candidate of the right of total control of disclosure of a positive test result renders the Georgia testing program far less intrusive of the candidate's privacy rights than the regulations involved in those cases.

An additional consequence of the procedure calling for the test results to be sent only to the candidate is that a positive test result is not made available to any law enforcement agency or any agency responsible for criminal prosecution. The nondisclosure of the results of the tests to third parties, who might use it to the disadvantage of the individual tested, is another factor which serves to decrease the intrusiveness of the drug test upon the individual's privacy interests. *See Von Raab*, 489 U.S. at 662; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2393.

The Georgia candidate drug test procedures maintain the privacy of the individual during the giving of the urine sample, limit the information revealed by the analysis of such sample, and place in the hands of the potential candidate the decision whether such information will be released to any other party. These procedures insure that the drug testing requirement constitutes a reasonable intrusion upon the potential candidate's Fourth Amendment right to be free from unreasonable search and seizure.

The next issue under *Burdick* is whether the drug testing statute is discriminatory in the imposition of the restrictions against which complaints are raised. The requirement applies across the board to all potential candidates covered by the statute, regardless of their party affiliation, race, gender, or other individual characteristics. *No* candidate who refuses to take the test or who

tests positive for illegal drugs (unless such positive test result is explained by a physician to be the result of prescribed medication) is permitted to qualify to run for the state offices. The statute does not discriminate between potential candidates who agree with the legitimacy of the drug testing requirement and those who oppose it. Petitioners make no argument that it is not applied uniformly or that, as candidates of the Libertarian Party, their right to be free from unreasonable search and seizure is burdened more heavily by the statute than is the same right of members of the two major parties.

Georgia's candidate drug testing statute imposes a reasonable and nondiscriminatory invasion of the Fourth Amendment rights of the potential candidates and, under *Gregory* and *Burdick*, the statute constitutes only a slight burden upon Petitioners' fundamental rights.

3. The drug testing statute serves important state interests.

The interests which justify requiring potential candidates for state office to submit to drug testing are important and, indeed, compelling. Apparently no federal court, other than the lower courts in this case, has considered the constitutionality of a drug testing program in the context of the power accorded the states under the Tenth Amendment to determine for themselves the qualifications of their governing officials or addressed the issue of the nature of state interests which are required to justify drug testing of potential candidates to state elective offices.

Under Georgia's Constitution, "[p]ublic officers are the trustees and servants of the people and at all times are amenable to them." Art. I, Sec. II, Par. I, Georgia Constitution of 1983 (included in Appendix at A-10.). In *Malcolm v. Webb*, 211 Ga. 449 (1955), Georgia's Supreme Court emphasized that the state's public officers, as servants and trustees, are bound to "exercise [their] best judgment and skill." *Id.* at 456. "The office was not forced upon them, but was voluntarily assumed." *Id.* Quoting Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928), the *Malcolm* court noted that:

> 'A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.
>
> * * *
>
> Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'

Id. at 456.

This Court has previously recognized drug abuse as one of the most serious problems facing society today, *Von Raab*, 489 U.S. at 674, and has also emphasized the role of governing officials in "the formulation, execution or review of broad public policy functions." *Gregory*, 501 U.S. at 462. Inherent in the state's right to determine for itself the qualifications it will demand for persons seeking to perform these important functions is the right to insist upon candidates who, if elected, will serve their

constituents with the utmost trust, integrity, competence, loyalty, and sound judgment. As this Court has discussed in each of its three previous drug testing cases, use of illegal drugs impacts tremendously each of these necessary characteristics.

Illegal drug use draws into question an individual's physical fitness and "integrity and judgment." *Von Raab*, 489 U.S. at 670. State officials who must submit to the drug testing requirement each have some power or influence which could be affected by the use of illegal drugs or could make such individual more susceptible to influence by those from whom such illegal drugs are obtained or who traffic in illegal drugs. The danger lies, not in the "stroke of a pen," Brief of Amici Curiae American Civil Liberties Union et al., at 9, but in the wielding of power and the making of decisions concerning activities either directly or indirectly related to the use of illegal drugs including arrests, convictions, and enactment of legislation. Other state officials may be likewise affected where their responsibilities include involvement in the creating of drug enforcement policy; inspecting goods coming into and going out of the state; determining agency budgets; hiring and firing personnel; or entering into contracts on behalf of the state. Each of the elected positions included in the definition of "state office" in O.C.G.A. § 21-2-140(a)(4) wields power that can be so influenced.

The nation's and the state's interest in fighting the drug war can be damaged by the state officer's use of illegal drugs or the officer's complicity with those involved in the importation and sale of illegal drugs. *See Von Raab*, 489 U.S. at 670. The Eleventh Circuit elaborated

on how Georgia's governor, lieutenant governor, commissioner of agriculture and members of the General Assembly may be adversely affected by use of illegal drugs. *Chandler v. Miller*, 73 F.3d 1543, 1546 (11th Cir. 1996). The lower appellate court noted that these "positions are particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard.' " *Id.*, *quoting Von Raab*, 489 U.S. at 674.

This rationale applies with equal strength to candidates for the elected positions of superior and appellate court judges and district attorneys. District attorneys prosecute drug users on a daily basis – the opportunity for bribery, blackmail, or simply bias in favor of defendants charged with drug crimes is obvious. Similarly, trial and appellate court judges, due to their involvement in the pretrial, trial, sentencing, and appeals by drug criminals, are vulnerable to influence. The state has an important interest in insuring that these public officials are drug free and, therefore, less vulnerable to undue influence from those involved in the drug culture.

The enactment of O.C.G.A. § 21-2-140 bears a relationship to the problems experienced in Washington, D.C., because of the illegal drug use by Mayor Marion Barry. The 1990 General Assembly enacted O.C.G.A. § 21-2-140 which was signed by the governor and became effective on April 16, 1990. 1990 Ga. Laws 2015. Mayor Barry had been indicted on February 15, 1990, less than two months before the approval of the Georgia statute, on charges of possession of cocaine and various other drug-related crimes. *United States v. Barry*, 938 F.2d 1327, 1329 n. 1 (D.C. Cir. 1991). Mayor Barry's arrest and the publicity which accompanied that arrest serve as an example of

the importance of avoiding, to the extent possible, the dangers posed to the public by the use of illegal drugs by Georgia elected officials.

Mayor Barry was convicted on August 10, 1990, and was subsequently sentenced to six months in jail. *Id.* Barry twice appealed the sentence and the Court of Appeals for the District of Columbia Circuit affirmed the trial court's decision in two opinions. *United States v. Barry, supra* (*"Barry I"*); *United States v. Barry*, 961 F.2d 1327 (D.C. Cir. 1992) (*"Barry II"*). The comments of the district court as it sentenced Mayor Barry are relevant to those interests which justify Georgia's candidate drug testing requirement:

> Of greatest significance to me in sentencing this defendant is the high public office he has at all relevant times occupied. . . .
>
> *His breach of public trust alone warrants an enhanced sentence . . .*
>
> Moreover, the prevalence of the public rumors of defendant's frequent and conspicuous drug use – never dispelled, and now unfortunately shown to be true – *has given aid, comfort, and encouragement to the drug culture at large, and contributed to the anguish that illegal drugs have inflicted on this city in so many ways for so long.*

Barry I, at 1331 n. 4; *Barry II*, at 265 (emphasis supplied).

In *Barry I*, the Court of Appeals for the District of Columbia Circuit affirmed the district court's statement in its sentencing order that the mayor "let down the community and gave 'aid, comfort, and encouragement to the drug culture at large.' " *Id.* at 1337. The mayor and his counsel had admitted that he had "failed as a role

model . . . and had disappointed the community." *Id.* at 1338. Barry had further admitted that "his actions had caused 'the citizens of [Washington D.C.] shame and enormous pain' and that his behavior 'hurt, confused and disappointed young people.' " *Id.* Undoubtedly, the mayor's drug problems affected tremendously his capacity and motivation to carry out his duties of protecting the liberty, safety, economic well-being of the public and enforcing the laws on their behalf. While a pre-qualifying drug test cannot eliminate problems caused by elected officials who use illegal drugs during their term of office, such test can serve to identify, before the fact, potential candidates who have severe and perhaps uncontrollable drug problems.

Mayor Barry serves as a prime example of how the public's confidence and trust in its elected officials can be easily abused by such officials' involvement with illegal drugs. Surely Georgia has an important and legitimate interest in avoiding to the extent possible the identical problems which would arise if a Georgia elected official were discovered, after he or she was elected, to be addicted to illegal drugs: shame and enormous pain and anguish to the citizens of this state and hurt, confusion, and disappointment to the state's young people who should be looking at their leaders as role models to be admired and followed.

Certainly, a state can seek to identify *before their election to office* individuals who because of their drug use may have ties to drug users or importers or who may otherwise bring "aid, comfort, and encouragement to the drug culture at large." *Barry I*, 938 F.2d at 1337; *see also Werme v. Merrill*, 84 F.3d 479, 487 (1st Cir. 1996) ("States

are free to head off potential problems in the electoral system before they materialize, as long as the solutions that the state devises are reasonable and do not significantly intrude upon constitutionally protected rights.")

This Court's previous drug testing cases all noted the deterrent effect that drug testing programs may have. *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395; *Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 628. Georgia's candidate drug testing statute serves the objective of deterring potential candidates who, without the drug testing requirement, might be elected to public office and who would be more likely than their fellow elected officials to abuse the power and trust of that position as a consequence of their use of illegal drugs.

As shown above, there are important state interests which justify the statute and which render it constitutional. In answer to Petitioners' argument that the statute serves only as a symbolic gesture reflecting the state's anti-drug policy,[1] "[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Turner Broadcasting System, Inc. v.*

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[1] This conclusion as to the legislative intent underlying O.C.G.A. § 21-2-140 is based upon a law review article which purports to quote the comments of one state legislator which were made in a telephone interview after the passage of the statute. Petitioners' brief at 20 n. 4. This Court has long made it clear that it will give scarce significance to such post-enactment remarks as to legislative intent. *Wright v. West*, 505 U.S. 277 (1992), at 295 n. 9; *see also Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 n. 3 (1982) and cases cited therein.

FCC, 512 U.S. ___, 114 S.Ct. 2445, 2464 (1994), *quoting United States v. O'Brien*, 391 U.S. 367, 383 (1968).

The Tenth Amendment guarantees Georgia the right to offer to its citizenry assurance that the individuals chosen to hold public office are not likely to violate the trust and confidence needed to perform the duties and responsibilities of their offices because of problems stemming from the use of illegal drugs. The state's constitutional right to determine for itself that only candidates who will offer this minimum assurance of trust, integrity, and sound judgment may run for the specified public offices constitutes the important interest necessary to justify Georgia's candidate drug testing statute.

Georgia has shown that its drug testing statute imposes only reasonable, nondiscriminatory restrictions of Petitioners' rights and that it is justified by important, indeed compelling, state interests. Accordingly, the statute is a valid exercise of the power guaranteed under the Tenth Amendment. Moreover, Georgia's statute is entitled to a low level of scrutiny in this Court's analysis of its constitutionality under the Fourth Amendment.

C. The Candidate Drug Testing statute is valid under the Fourth Amendment because its minimal intrusions into the potential candidate's legitimate expectations of privacy are substantially outweighed by important state interests.

This Court's previous drug testing cases teach that a government drug testing program is constitutionally valid where there is a special need, beyond the normal needs of law enforcement, which justifies a departure

from the ordinary warrant and probable cause requirements of the Fourth Amendment. *Skinner*, 489 U.S. at 619, 620; *Von Raab*, 489 U.S. at 665; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2391. A "special need" exists, in turn, where the public interest in the government program outweighs the privacy concerns implicated by the tests, without reference to the usual presumption in favor of the procedures specified in the Fourth Amendment's warrants clause. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665-66; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2391.

In each of these previous cases, this Court found the existence of such a special need justifying the drug testing in the absence of a warrant or probable cause. In *Skinner*, the Court approved urine and blood testing of railway workers, finding a special need in the safety interests of the workers themselves as well as the general public. 489 U.S. at 260. *Von Raab* approved a United States Customs Service policy which required drug testing of all employees who sought promotion to positions which involved direct participation in drug interdiction activities or required possession of a firearm while on duty. 489 U.S. at 660-61. *Vernonia* approved scheduled and random urine drug testing of student athletes throughout an Oregon school district. 515 U.S. at ___, 115 S.Ct. at 2388-91. The Court had no difficulty in determining that the school setting constituted a "special need" justifying a search without warrant or probable cause. *Id.*, 515 U.S. at ___, 115 S.Ct. at 2391.

The analysis of the legitimacy of the special need asserted by Georgia is entitled under the Tenth Amendment to the special deference and lowered level of scrutiny recognized in *Burdick* and *Gregory*. These cases teach

that Georgia must justify its election statute with important state interests and, by extension to the drug testing context, they require that the special need justifying Georgia's statute be analyzed under a less strict standard than that used by the Court in its three previous drug testing cases.

As discussed above, *supra* at 11-18, there are important interests which justify disqualification of potential candidates who use illegal drugs. These important justifications constitute a "special need" which is as compelling as were the special needs approved by the Court in *Skinner*, *Von Raab*, and *Vernonia*. Contrary to the argument urged by Petitioners, use of illegal drugs by state elected officials has significant and far reaching consequences to the citizens of Georgia and to the operations of governmental functions within the state.

Skinner and its progeny next require balancing the legitimate privacy interests of the potential candidates which are impacted by the testing requirement against the asserted interests sought to be served by the testing program. *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2390. Those privacy interests which are considered by society to be legitimate, and therefore entitled to Fourth Amendment protection, vary with context. 515 U.S. at ___, 115 S.Ct. at 2391. Furthermore, the legitimacy of such privacy interests may be dependent upon the individual's legal relationship with the State. *Id.*

In its discussion of the *Burdick* test, Georgia addressed in some detail the impact of the drug testing requirement upon candidates' Fourth Amendment rights. *See supra* at 8-11. A closer examination of the issue, under

the principles established in *Vernonia*, leads to the conclusion that the legitimate privacy interests of candidates to public office are very limited.

Perhaps most relevant to the degree of privacy legitimately expected by candidates to public office is that the candidates are qualifying to be elected to *public office*. The very nature of political campaigns, particularly where an individual has opposition, is a thorough and sifting examination of the candidate's qualifications to hold office. This examination is conducted not so much by the government as by the public and the media, and includes more than a determination of the candidate's political positions. The questions of integrity and competence may be primary factors in the voters' decisions about which candidate they choose to support.

This Court has recognized the public's right to information about those who choose to run for political office. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1970), and *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1970), this Court held that publications concerning candidates must be given the same heightened protections afforded by *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) to publications which discuss public officials. The Court in *Monitor Patriot* emphasized that "*[a]nything* which might touch on an official's fitness for office" is knowledge relevant to the electorate. *Id.*, 481 U.S. at 273, *quoting Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964) (emphasis supplied). Further,

> [f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these

> characteristics may also affect the official's private character.

Monitor Patriot, 401 U.S. at 273-74, *quoting Garrison*, 379 U.S. at 76-77.

Until individuals decide to enter politics, the private nature of such personal matters remains inviolate. Once such individuals choose, however, to enter the political arena, they give up their right to privacy to a very large extent and cannot complain about the public's demand for knowledge concerning their "private character." A candidate "concedes that when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight." *Nixon v. Administration of General Services*, 433 U.S. 425, 455 (1976), citing *New York Times*. The public is entitled to know "anything which might touch on [the candidate]'s fitness for office," *Garrison*, 379 U.S. at 76-77, including his or her use of illegal drugs.

A second factor which diminishes the candidates' privacy expectations is the control the candidates exercise over whether they will subject themselves to the drug testing requirement. No one is forced to become a candidate. That candidates voluntarily decide to run for office is a significant factor which decreases the candidates' legitimate privacy interests. *See Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2392 ("By choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation ever higher than that imposed on students generally"); *Von Raab*, 489 U.S. at 671-72.

Under Georgia law, candidates for state office are required to file extensive financial disclosure statements

with appropriate state election offices. O.C.G.A. § 21-5-50(c)(1). Candidates must disclose specific details about fiduciary positions they may hold, all business interests in which they hold a certain ownership interest, real estate holdings above a certain value, and transactions with the state totaling a certain annual value. These regulations apply either to the candidate alone or, in some cases, to his family and business. Finally, candidates for public office, including state officers, are also subject to pervasive regulation and disclosure requirements with respect to campaign contributions of more that $101.00. *See* O.C.G.A. § 21-5-30 *et seq*.

These regulations may be considered by some candidates much more intrusive than the drug testing requirement because they may feel that nothing is entitled to more privacy than their personal financial affairs. These disclosure requirements are highly intrusive but are nonetheless constitutional. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Igneri v. Moore*, 898 F.2d 870, 873-74 (2nd Cir. 1990). The state's inquiry into these personal matters resembles the extensive background checks required of applicants for certain federal government positions. Courts have recognized that submission to such background checks as a prerequisite to employment significantly lowers an individual's privacy interests for Fourth Amendment purposes. *See Von Raab*, 489 U.S. at 677; *National Treasury Employees Union v. United States Customs Service*, 27 F.3d 623, 629 (D.C. Cir. 1994).

Two additional aspects of the privacy expected by an individual subjected to a drug test are the degree of intrusiveness of the testing procedures and the information revealed by the test. *Vernonia*, 515 U.S. at ___, 115

S.Ct. at 2393. The procedures utilized in the Georgia test are highly protective of the candidate's privacy interests inherent in the matter of bodily excretory functions and assure that the only information revealed by the test is the presence of the five designated drugs.

The voters' right to information concerning candidates, when combined with the decrease in their personal privacy which potential candidates know will occur once they voluntarily enter politics and the minimum intrusiveness of the testing procedures themselves, requires the conclusion that the Georgia drug testing statute constitutes only a slight intrusion into the legitimate privacy rights of potential candidates.

Against this low intrusion on privacy must be weighed the interests asserted by Georgia as justification for its candidate drug testing statute. While these interests are compelling, the analysis above shows that the statute may be upheld as constitutional by this Court by interests which are deemed to be important. *Burdick*, 504 U.S. at 434. The *Burdick* decision should be considered in conjunction with the holding of this Court in *Vernonia* where Justice Scalia, writing for the majority, observed that the state's interest need not necessarily be compelling but must only appear "*important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2394-95 (emphasis in original). The statute at issue here has previously been shown *not* to be "relatively intrusive upon a genuine interest of privacy."

Georgia has discussed at length above, *supra* at 11-18, the state interests which justify its candidate drug testing statute. The absence of a history of drug use by state elected officials does not detract from these important interests. *See Von Raab*, 489 U.S. at 674; *see also Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395. Petitioners here cannot argue, any more than could the petitioners in *Von Raab*, that elected officials are "immune from this pervasive social problem." *Id.*

This Court's opinions emphasize that in order to be valid under the Fourth Amendment, the drug testing program is not required to be the most effective way of identifying illegal drug use. *Von Raab*, 489 U.S. at 673-76; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395. It is enough that the drug testing program serve to a reasonable extent the objectives sought to be achieved by the statute. The drug testing program established in Georgia is substantially similar to the railway, Customs Service, and school programs approved by this Court and its efficacy must be assumed to be substantially similar as well. This Court, in a similar vein, has also made clear that absolute deterrence is not necessary for the statute to be constitutional. *Skinner*, 489 U.S. at 629-30; *Von Raab*, 489 U.S. at 674-75; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395. Georgia's statute can be assumed to deter some individuals who use illegal drugs from attempting to qualify to run for state office and therefore serves important state interests.

In summary, the important state interests in conducting such pre-qualification drug testing include providing significant information to voters about the trustworthiness, integrity, honesty, and judgment of candidates for public office, which information will serve to avoid the

loss of trust, confidence, and faith in government and a tragedy such as that experienced by Washington, D.C.; the incompatibility of illegal drug use and the power and trust which are held by those who are elected to state office; avoidance of problems which would quite likely result from use of illegal drugs by elected officials; and, finally, deterrence of drug use by such officials. These interests are sufficiently important to meet both the requirements of the test established in *Burdick* for the constitutionality of a state elections statute under the Tenth Amendment as well as the test in *Vernonia* for the constitutionality of a drug testing regulation under the Fourth Amendment. These important interests outweigh the slight invasion of the limited legitimate privacy interests of potential candidates to state elective office. Accordingly, this Court should affirm the decision of the Eleventh Circuit that the statute does not violate the Fourth Amendment.

II. THE CANDIDATE DRUG TESTING STATUTE IMPOSES NO RESTRICTIONS UPON PETITIONERS' FIRST AMENDMENT RIGHTS AND, ASSUMING IT DOES, IT IS A CONTENT-NEUTRAL SPEECH REGULATION WHICH IMPOSES ONLY MINIMAL BURDENS ON SPEECH RIGHTS AND IS JUSTIFIED BY IMPORTANT STATE INTERESTS.

As the persons claiming a state-imposed infringement of their right to engage in assertively aggressive conduct, it is Petitioners' burden to show that the Georgia drug testing statute has any impact on First Amendment rights. *Clark v. Community for Creative Non-Violence*, 468

U.S. 288, at 293 n. 5 (1984). Petitioners presume that requiring candidates to submit to a drug test when they strongly disagree with its validity results in a content-based restriction on free speech. If this presumption is incorrect, as Georgia contends, then Petitioners have failed to raise a First Amendment issue.

In *United States v. O'Brien*, 391 U.S. 367, 376 (1968), this Court rejected the claim of a Vietnam war protester that the burning of his draft card constituted protected "symbolic speech." This is the precise position espoused by Petitioners here – their disagreement with and desired refusal to submit to the drug testing requirement constitute "expressive conduct." *O'Brien* plainly disavowed "the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends to thereby express an idea." *Id.* at 376.

In support of their "symbolic speech" argument, Petitioners rely upon this Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989). In order for the *Texas v. Johnson* case to have any relevance to the issues before this Court, the act of submission to the drug test or the refusal to do so must reflect "an intent to convey a particularized message," 491 U.S. at 404, and there must be a great likelihood "that the message would be understood by those who viewed it." *Id.* The Court in that case had no difficulty in finding that the burning of the American flag, an object long endowed with great symbolism, conveyed a specific message and that such message would be understood by all who witnessed the act. *Id.* The same conclusion cannot be drawn here.

Compliance or refusal to comply with the testing requirement when one is opposed to the legality of the test cannot be analogized to the burning of the United States flag. A potential candidate's decision to comply with the drug testing requirement or to refrain from doing so could be based upon an indefinite number of reasons other than opposition to the statute. Such decision does not convey any particularized message. Certainly no message would be perceived, much less understood, by the electorate without further elaboration by the candidate, that is, without exercise of the candidate's right to freedom of speech, which remains free and unabridged by O.C.G.A. § 21-2-140.

Petitioners' argument that submission to the drug testing requirement or refusal to do so constitutes expressive conduct protected by the First Amendment has broad consequences. Any citizen could argue that his political opposition to a given statute or regulation would compel invalidation of the statute because forced compliance would send a message. This Court, however, has recognized the far-reaching effects of such a holding and has rejected it in various contexts even where fundamental rights such as freedom of religion and freedom of the press are involved. "If prohibiting the exercise of religion [by prohibiting use of peyote] (or burdening the activity of printing) is not the object of the [regulation or] the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Division v. Smith*, 494 U.S. 872, 878 (1989).

Petitioners have failed to satisfy their initial burden of showing that the Georgia drug testing statute impacts

in any respect their right to free speech. Assuming, for the sake of argument only, that the statute raises a First Amendment issue, it must initially be kept in mind that the statute was enacted by the Georgia General Assembly pursuant to the power accorded the state under the Tenth Amendment to determine for itself the qualifications of its elected officials. Using the lowered standard authorized under *Burdick* and *Gregory*, this Court must determine whether the statute constitutes a content-neutral or, as Petitioners contend, a content-based speech regulation.

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. at ___, 114 S.Ct. at 2459, this Court reiterated the distinction between content-based and content-neutral regulations:

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, *laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.*

Id. (Emphasis supplied).

The Georgia candidate drug testing statute, to the extent it imposes any burdens on speech, does so without reference to any idea or view expressed by any candidate and is, therefore, a content-neutral regulation. *See Clark v. Community for Creative Non-Violence*, 468 U.S. at 288. The Georgia statute can be contrasted with the regulation under attack in *McIntyre v. Ohio Elections Comm*, 514 U.S. ___, 115 S.Ct. 1511 (1995), where this Court struck down on First Amendment grounds an Ohio election statute banning all anonymous campaign literature. Although

recognizing the deference given to the states to control their own elections, the *McIntyre* Court considered the statute to be a regulation of pure speech and, therefore, content-based, rather than one governing "the mechanics of the electoral process" as had been involved in *Burdick* and *Gregory*. 514 U.S. at ___, 115 S.Ct. at 1517. The statute therefore did not qualify for the lower scrutiny which had been applied to the election statutes at issue in those earlier cases. 514 U.S. at ___, 115 S.Ct. at 1518.

Turner holds that a content-neutral regulation is valid where:

> it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

512 U.S. at ___, 114 S.Ct. at 2469.

Georgia's interests in identifying, disqualifying and deterring users of illegal drugs from running for state elected office are important. These interests are unrelated to the suppression of speech. Finally, the minimal restriction of Petitioners' free speech rights is essential in order for Georgia to achieve its described goals. Accordingly, under the test set forth in *Turner*, O.C.G.A. § 21-2-140 is a valid content-neutral regulation.

The statute at issue in this case is distinguishable from the Georgia statute which was struck down in *Bond v. Floyd*, 385 U.S. 116 (1966). Unlike the statute at issue in *Bond*, the candidate drug testing statute does not mandate that a potential candidate keep silent his views of the

legitimacy or efficacy of the statute or any other policy position. It does not require that he or she agree publicly with the State's position with respect to the statute, nor does it demand proof of the candidate's sincerity of his or her oath to uphold the federal or state constitutions. *See Bond*, 385 U.S. at 132.

The Georgia candidate drug testing statute does not affect speech rights in any way; even assuming it does, under *Turner*, it is a valid content-neutral speech restriction. Under *Burdick*, in turn, it imposes only reasonable restrictions on Petitioners' speech rights and such restrictions are justified by important state interests. The statute does not violate the free speech rights of potential candidates and the decision of the Eleventh Circuit on this issue should be affirmed.

CONCLUSION

For all of the above and foregoing reasons, Georgia prays that the judgment of the Eleventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

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O.C.G.A. § 21-2-140

21-2-140. Mandatory drug testing for candidates.

(a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53, Fed. Reg. 11979, et seq., as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine; opiates; amphetamines; or phencyclidines, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate with the officer with whom such candidate, qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. Such certificate shall be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources under subsection (e) of this Code section. Such tests shall be conducted at the expense of the candidates, provided, however, that upon submission of a valid pauper's affidavit and a valid receipt, a candidate shall be reimbursed by the Secretary of State for the cost of such test in an amount not to exceed $50.00, No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate for filing at the time of such qualification.

(d) The certificates required under subsection (c) of this Code section shall be filed with the Secretary of State and shall be available for public inspection. If a candidate qualifies with a political party for nomination or election to a state office, such party shall submit all such certifications to the Secretary of State as such time as such candidates are certified by the party to the Secretary of State. Such certificates shall be maintained by the Secretary of State for a period of three years.

(e) The commissioner of human resources shall be authorized to establish guidelines governing the administration of drug tests performed pursuant to this Code section and shall maintain a list of those laboratories qualified to conduct established drug tests.

(f) The commissioner of human resources and the Secretary of State shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section. (Code 1981, § 21-2-140, enacted by Ga. L. 1990, p. 2015, § 1; Ga. L. 1992, p. 1612, §§ 1-3.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALKER L. CHANDLER, SHARON T. HARRIS and JAMES D. WALKER, Plaintiffs,	*	CIVIL ACTION NO. 1-94-CV-1298-ODE
v.	*	
ZELL MILLER, Governor of Georgia; MAX CLELAND, Georgia Secretary of State; and JAMES G. LEDBETTER, Commissioner, Department of Human Resources, Defendants.	*	

JOINT STATEMENT OF UNDISPUTED FACTS

Plaintiffs and Defendants, by and through their undersigned counsel, agree for purposes of entry of Final Judgment that the facts set forth below are undisputed and constitute the evidence of record for purposes of an appeal taken in this matter.

1. During the 1990 session of the General Assembly of Georgia, O.C.G.A. § 21-2-140 was enacted which requires any person seeking to qualify for nomination or election to a state office to file a certificate stating that the candidate has been tested for illegal drugs within 30 days prior

to qualifying and that the results of the test are negative. (Copy of O.C.G.A. § 21-2-140 attached as Exhibit A.)

2. Under O.C.G.A. § 21-2-140(a)(4) the state offices to which the testing requirement applies are: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court and Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

3. The statute requires the collection and testing of the fluid samples administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53, Fed. Reg. 11979, et seq.) or professionally valid procedures.

4. Candidates for the offices listed above are informed that the required testing may be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. The procedures included in the above Federal Regulations for collection of the specimen are adhered to at both collection sites, including those intended to guarantee the privacy of the potential candidate.

5. The specimen is sent by the lab or the physician's office to an approved laboratory for testing. All chain of custody procedures are complied with fully. (*Id.*) A five panel drug screen is performed. The certificate contemplated by the statute does not include a detailed chemical analysis of the candidate's urine, or other bodily fluids,

but merely provides that a drug screen has been performed and that the results are negative, except as necessary to explain any positive drug test results.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing JOINT MOTION FOR ENTRY OF FINAL JUDGMENT, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed to plaintiffs' counsel of record, to wit:

Walker L. Chandler, Esq.
P.O. Box 7
Zebulon, Georgia 30295

Harvey Harkness, Esq.
P.O. Box 497
Marietta, Georgia 30061-0997

This 18th day of January, 1995.

/s/ Patricia Guilday
PATRICIA GUILDAY
Assistant Attorney General

Tenth Amendment to the United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Art. I, Sec. II, Par. I, Georgia Constitution of 1983

Paragraph I. Origin and foundation of government.

All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.